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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1377

NATHAN WECHSLER, GEORGE FAIGEN, SEYMOUR FAIGEN, SIGMUND GOLDBLATT, ROBERT C. COTTEN, JR., and A. CLAIBORNE LEIGH, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO SUPPLEMENT AND SUPPLEMENTAL MEMORANDUM ON PETITION FOR REHEARING

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UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR REHEARING

Petitioners respectfully move this Court for leave to supplement the Petition for Rehearing filed by them in this case. The purpose of the motion is to call to this Court's attention, and to discuss the implications for this case of the Brief for the United States in *United States* v. *Nardello,* No. 51, Oct. Term 1968.* In that brief the Government adopts a construction of 18 U.S.C. § 1952(a)(3) and (b)(2) which is in accord with the position of petitioner, but contrary to the theory of the prosecution and the lower courts. We show in the supplemental memorandum that the Gov-

* Unless this motion is granted, the Court will probably not have examined the government's brief in *Nardello* when it considers the present Petition, which in the normal course would be during the first week of October, prior to the scheduled commencement of oral arguments.

ernment's *Nardello* brief (1) is inconsistent with its position in prosecuting petitioners; (2) makes it almost certain this Court will ultimately adopt a construction of 18 U.S.C. §§ 1952(a)(3) and (b)(2) under which petitioners' guilt cannot be supported; and (3) reinforces our position in the Petition for Rehearing that this case should either be heard together with *Nardello*, or at a minimum, held in abeyance pending decision of that case.

For these reasons we urge that the present motion be granted, and that the supplemental memorandum be received and considered.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-[illegible]

NATHAN WILLIAMS, *Chief Fiscal Officer, Maryland Department of Health and Mental Hygiene*, STANLEY GOLDSTEIN, *Secretary, Department of Health and Mental Hygiene*, and A. SHERIDAN LEDDY, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL MEMORANDUM OF PETITION FOR REHEARING

The [illegible] question presented by the Petition for Certiorari, the answer to which [illegible] the Court of Appeals overlooked (Pet. 5a-7a) [illegible] at the heart of this case, is:

"Is the term 'assistance' as used in 42 U.S.C. § 1396d(a)(13) [illegible] by the same term identified in § 1396d(b) [illegible] Part C[illegible] of Title [illegible]?"

arrange a [illegible] brief (3) is inconsistent with its position in [illegible] petitioners (2) assure it at least certain that Court will [illegible] adopt a construction of 28 U.S.C. 55 [illegible](a)(2) and (3)(B) under which petitioners' suit cannot be supported; and (4) reinforces the position in the Petition for Rehearing that this case should either be heard together with Nashville, or at a minimum, held in abeyance pending decision of that case.

For these reasons petitioners urge that the present motion be granted, and that the supplemented memorandum be received and considered.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

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UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL MEMORANDUM ON PETITION FOR REHEARING

The first question presented by the Petition for Certiorari, the answer to which—as the Court of Appeals recognized (Pet. 1a-2a)—is at the heart of this case, is:

> "Is the term 'unlawful activity' as used in 18 U.S.C. § 1952(a)(3) circumscribed by the state laws identified in § 1952(b)(2), thereby requiring proof of a use of interstate facilities with intent to violate those state laws?" (Pet. p. 2)

In Petitioners' view this question must be answered in the affirmative. The United States has now filed a brief wherein it agrees with Petitioners' construction of 18 U.S.C. §§ 1952(a)(3) and (b)(2)—a construction contrary to the theory upon which the case was sent to the jury and upon which petitioners' convictions were affirmed.

In its brief on the merits in *United States* v. *Nardello,* No. 51 Oct. Term 1968, (hereafter "Br. for U.S."), the Government says:

> "To be faithful to the congressional purpose, we submit, what is determinative must be whether the conduct is within the generic connotation of 'extortion', as Congress used the term, *and* whether the activity is prohibited by state law." (Br. for U.S., p. 13)[1]

The use of the conjunctive *and* (emphasized by the Government) makes it entirely clear that the Government regards the violation of state law as essential to the federal offense. The Government explains why the offense created by federal law is indeed "equated with and limited by state law," contrary to the view of the Court below (Pet. App. pp. 1a-2a):

> "Because the avowed purpose was to plug the breach in effective state enforcement, Congress related the activities banned to violations of the laws of the state in which they take place." (Br. for U.S., p. 14)

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[1] See also Br. for U.S., p. 18: "But where the conduct is extortionate in the federal, generic usage—like 'gambling' in the examples above—*and* where the state does make it unlawful, Section 1952 is by its terms and its purpose applicable—just as it would be applicable to the interstate bookmaker just discussed." (Emphasis in original)

Accordingly,

> "The objective of assisting state law enforcement is reflected in the decision to withhold federal penalties for conduct which is not an offense at all under state law." (Br. for U.S., p. 16)

The same point had been conceded by the Government's Brief in Opposition to certiorari in this case, quoting from its own Jurisdictional Statement in *Nardello.* But the Government then proceeded to confuse the issue by the following circumlocution:

> "But that does not mean that the reach of the federal statute is to be circumscribed by the events to which each State determines its local prosecution should attach." (Br. in Opp., p. 7)

We pointed out in our reply brief that this latter proposition is simply irreconcilable with the Government's concession, since the existence of a violation of federal law depends precisely on "the events to which each State determines its prosecution should attach." This is confirmed by the Government's brief in *Nardello,* which, by the use of two different examples, shows that there could be no violation of § 1952(a)(3) if the state has determined that its prosecution should not attach to those "events". At pp. 15-16 of its *Nardello* brief the Government explains that the legality under § 1952(a)(3) of interstate travel to Nevada to operate a dice game depends on whether Nevada forbids that conduct. And, at p. 17 of that brief, it says:

> "We would agree, for example, that if by state statute, whether labelled blackmail or extortion, a crime is committed only when money or property is extracted by threat of force, then travel to

> that state in order to make threats to accuse a person of an infamous crime would not be an offense under 18 U.S.C. 1952."

This means, borrowing the Government's formulation in its Brief in Opposition herein, that "the reach of the federal statute" *is* "circumscribed by the events [*e.g.* extraction of money by threat of force] to which each State determines its local prosecution should attach."

In short, the "proper inquiry, we submit, is whether the intended extortionate [or briberous] acts of the defendant are prohibited by state law." Br. for U.S., p. 8. And since there is no such crime as an "unlawful-zoning" under Virginia law, petitioners could not be found to have used interstate facilities with intent to promote an "unlawful activity" under §§ 1952(a)(3) and (b)(2). Accordingly, petitioners were convicted of a nonexistent federal offense.

It would be entirely inconsistent with the Government's deliberately chosen position in *Nardello* to subject petitioners to "federal penalties" when their conduct was "not an offense at all under state law" (Br. for U.S., p. 16).

We recognize that the Government's construction of 18 U.S.C. § 1952(a)(3) is not binding on this Court. This Court would have power to hold that the correct interpretation is alternative (3) set forth in our Petition for Rehearing—that "unlawful activity" covers any act, whether or not illegal under state law, so

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[2] As Judge Winter said in dissent below, "petitioners were convicted of 'a federal crime not brought into existence by § 1952 itself,' the use of interstate facilities with intent to promote an illegal zoning." 392 F. 2d at 351-352.

long as is sufficiently related to "extortion, bribery or arson" as to bring the actors within the "manifest purpose of the [federal] statute."[3] This was the view taken by the Court of Appeals in affirming petitioners' conviction. But it seems to us highly significant that in preparing its brief in *Nardello,* the Government eschewed that alternative, although it would likewise require reversal of the lower court judgment in that case, and would maintain consistency with the theory on which the *Wechsler* petitioners were prosecuted and convicted.

It is fair to regard the choice, made at the highest litigating level in the Justice Department, with full awareness of the pendency of the present case, as a carefully deliberated interpretation of this statute. Moreover, even if there had been doubt, considerations of litigation strategy, as well as the natural tendency—whose propriety we do not impugn—of enforcement officials to urge a broad, rather than a narrow construction, would have caused the Government to urge the construction by the Court of Appeals herein, rather than alternative (2), or at least to argue for reversal in *Nardello* on the basis of both alternatives. The inference is compelling that since the Government decided that it could not fairly urge alternative (3), there is little likelihood that this Court will ultimately determine it to be the correct construction of § 1952 (a)(3). The Government's action thus reinforces our argument in the Petition for Rehearing (pp. 1-2) that when this Court decides *Nardello,* it " may authoritatively affect the outcome of this case."

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[3] Pet. pp. 2-3, quoting from *Wechsler* v. *United States,* 392 F. 2d 344 at 347.

Petitions for Rehearing are understandably not favored. But this Court has granted such petitions, *even though filed out of time*—to assure "uniformity in the application of the principles" announced by this Court. See *United States* v. *Ohio Power Co.*, 353 U.S. 98 and cases cited *id.* at 99.[4] Of particular interest are the cases where the Court *sua sponte* granted rehearing out of time from denials of petition for certiorari in prosecutions on a net worth theory, so that they could be reexamined under the rules established in *Holland* v. *United States*, 348 U.S. 121, even though it was uncertain whether the outcome of those cases would be affected thereby.[5] Here, of course, the Petition for Rehearing is *timely*, and adoption of the construction in *Nardello* of §§ 1952(a)(3) and (b)(2) contended for by the present petitioners—and now by the Government—would *necessarily* entitle them to a new trial, or, indeed, as Judge Winter believed, to acquittal.

It would be shocking to send petitioners to prison when the Government has disavowed the statutory basis of their prosecution, particularly since this Court can be expected to decide in *Nardello* that the conduct

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[4] In dissenting from the grant of rehearing in *Ohio Power* Mr. Justice Harlan said: "I need hardly say that the granting of untimely relief in criminal cases presents considerations not found in civil cases." 353 U.S. 99, at 106. These considerations are, of course, present here and can be effectuated without disregard for the Court's own rules.

[5] *Goldbaum* v. *United States*, 347 U.S. 1007; *Banks* v. *United States*, 347 U.S. 1007; *McFee* v. *United States*, 347 U.S. 1007. Those petitions for rehearing were granted before *Holland* was argued. Ultimately, certiorari was granted and the causes remanded for reconsideration in light of *Holland* and its companion cases. 348 U.S. at 905.

with which petitioners were charged is not an offense at all under federal law.

Respectfully submitted,

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